

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

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75-1415

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 75-1415

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

BERNARD SCHIFTER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF DEFENDANT-APPELLANT

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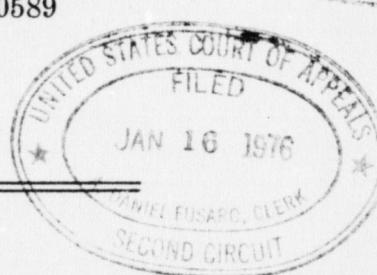


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-against-

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PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York rendered on December 5, 1975 (PLATT, D.J.) after a jury trial which convicted the appellant of the crime of violating Title 18, U.S.C. Sections 549 and 659 and sentencing him in accordance with 18 U.S.C. Section 4208(b) and (c) to a period of two (2) years under Count I and ten (10) years under Count II. In addition, a fine of \$5,000.00 was imposed.

SUMMARY

This case may be summarized as follows: Bernard Schifter allegedly negotiated a sale of camera lenses stolen at Kennedy Airport to an undercover agent, a New York City Detective named Joseph Giordano. The transaction took place on the defendant's Service Station located in Brooklyn, New York. Agent Giordano was wired with a transmitter. Federal agents were located nearby recording the conversation between Agent Giordano and Schifter. A signal was given after Agent Giordano passed \$1,000 to Bernard Schifter for the camera lenses and the defendant was thereupon arrested. It is contended under our Points that at the juncture of arrest and the seizure of the evidence there was no probable cause.

We further contend that appropriate Miranda warnings were not proffered. Inasmuch as it was necessary to extensively treat the facts under our Point, infra, they are not exhaustively treated here to avoid unnecessary repetition.

POINT I

THE ORDER DENYING AFTER A HEARING TO SUPPRESS PHYSICAL EVIDENCE AND ORAL STATEMENTS WAS CONTRARY TO LAW AND AGAINST THE WEIGHT OF EVIDENCE. THE COURT BELOW WAS CLEARLY ERRONEOUS IN NOT GRANTING THE MOTION.

A. The Weight of the Credible Evidence Clearly Reflects an Omission to Timely Present the Miranda Warnings:

On September 20, 1974, at defendant Bernard Schifter's Esso Gas Station, located at 108th Street and Flatland Avenue, Brooklyn, New York, undercover Agent Joseph Giordano and defendant Schifter were arrested by Government Agents. Undercover Agent Giordano had secreted upon his person a transmitting device which permitted the Government Agents (Kopeski and Grattan) located nearby in a Government automobile to record the conversation between Schifter and Giordano. In addition, it permitted the recordation of the conversation at the exact moment of arrest.

The Government offered a transcript of the taped conversation(s). We will, insofar as is pertinent to our argument, advert to this transcript below.

Agent Mark Thornton testified that pursuant to a pre-arranged signal he approached the gas station and arrested defendant Schifter. Schifter, according to Agent Thornton, was handcuffed and given his Miranda warnings in the following manner: "I advised him that he had a right to remain silent, and anything he said could be used against him in a court of law; that if he wanted to consult an attorney before answering any questions he could, if he didn't,

if he couldn't afford an attorney, the government would get one for him; if he wanted to stop answering questions at any time, he could." (8-9)*

According to Agent Thornton, Schifter merely nodded his head (8). Agent Thomas Maxwell was present while Thornton was giving Schifter his Miranda warnings (3); in answer to, if he, Thornton had any conversation with Schifter, Thornton replied that Maxwell asked Schifter where he had obtained the money (the \$1,000) and Schifter replied that it was for "gas money" (10).

When confronted with his Grand Jury testimony, Thornton admitted giving this contradictory testimony (T. 268).

"ANSWER: Yes, immediately after I approached him and advised him that he was under arrest for a theft of goods, possession of goods stolen from Custom's custody, I asked him to empty his pockets. He had \$1,000 in cash among other items and I asked him what he was doing with that money and he said it was gas money."

Agent Thornton testified concerning Maxwell's whereabouts at the time of Schifter's arrest, as follows:

"Q. Now, as you recall, going back to the time when the arrest was made, you came in and Giordano and the

* Unless otherwise indicated, numerals indicate Suppression Hearing and hereafter the letter "T" followed by numerals indicate Trial Proceedings

defendant were together, correct?

A. Yes.

Q. How long after that would you say Agent Maxwell came in?

A. After I came in?

Q. After you came in.

A. I would say he was there about the same time.

Q. Well, would you say he was there a minute later?

A. No, I wouldn't say that.

Q. Half a minute later?

A. About the same time.

Q. Within the same two or three seconds?

A. Something like that.

Q. So that Agent Maxwell was privy to everything that was said?

A. I don't know that.

Q. At least for the time that he was there?

A. Where?

Q. Withdrawn. When you came in, as I understand, you immediately said to the defendant and Giordan, 'You are both under arrest,' is that correct?

A. I directed my attention to Mr. Schifter.

Q. Right, the defendant?

A. Right.

Q. But Giordano was standing there, is that correct?

A. He was, but I think he was separated.

Q. How far away was he?

A. I don't know, he was about next to me, I know that.

Q. Five feet, eight feet?

A. Perhaps.

Q. Within the area?

A. Could have been ten to twenty as far as I know.

Q. You are telling me that when you arrived at the scene you didn't know in point of view of time how far Giordano was away from the defendant?

A. When I arrived on the scene he was next to him.

Q. How is that?

A. When I arrived on the premises of the gas station he was standing next to the defendant Schifter.

Q. When they were standing next to each other, did you say to both of them, 'You are under arrest'?

A. No. I directed my attention to Mr. Schifter.

Q. Are you saying to us, when you arrived on the scene you took Schifter away from where Giordano was standing?

A. I said, come over here or words to that effect.

Q. This is before you told him, 'You are under arrest'?

A. Perhaps.

Q. You are not certain?

A. Perhaps, I don't know which words I said first.

Q. But Maxwell was there then guarding Giordano?

A. I don't know where Maxwell was all the time. I know he was next to me. I don't know if he was next to me all the time.

Q. Then you said to defendant Schifter, 'You are under arrest', and you handcuffed him?

A. Yes.

Q. And then Agent Maxwell appeared -- that is, he was in the area and he came over to make the search?

A. Yes." (T-257-259)

Agent Maxwell had testified that by a prearranged signal he was advised over the radio in his car to move into the gas station. He arrived about twenty to thirty seconds after Thornton (52, 54)

It is noteworthy that Agent Maxwell first testified:

"Q. Were you present when Agent Thornton read the defendant or advised the defendant of his rights?

A. I, in addition advised the defendant of his rights; yes.

Q. You were present when --

THE COURT: He said both of them advised him of his rights.

Q. What I'm trying to get at now, did Agent Thornton advise him ~~or~~ his rights and then you advised him of his rights?

A. Yes.

Q. So Agent Thornton first advised him of his rights.

A. Yes.

Then, in an amazing turnabout Agent Maxwell testified as follows:

"Q. Did he read him a card?

A. I don't recall.

Q. What do you recall Agent Thornton saying to this defendant at the time he was arrested with respect to his rights?

A. When he was talking to the defendant I wasn't in a position to overhear him.

Q. Where were you?

A. I was coming into the station while Agent Thornton was talking to the defendant.

Q. Didn't you indicate before that you came in about 20 or 30 seconds after that, after Agent Thornton, and nothing was happening?

A. Agent Thornton was talking to the defendant about 20, 30 second, then I arrived.

Q. So, as I understand it then, you, as you sit there, don't recall Agent Thornton advising him of his rights at all?

A. Not Agent Thornton, but I did.

Q. You don't recall that Agent Thornton ever advised him of his rights?

A. That's right.

Q. You now tell us you were the one who advised him of his rights?

A. Agent Thornton could have.

Q. Did you hear him?

A. No.

Q. At any time?

THE COURT: Don't argue with him. Your statement was he was the only one. He has not so testified. He just never overheard Thornton advise him (T-57).

Agent Maxwell testified he advised Schifter of his rights at the Gas Station. Then a second time in the Government car leaving the Gas Station and then a third time at Kennedy Airport, "Building 80" (T-58, 59).

At pages 60-61 of the Record, Maxwell remarkably testified as follows:

"Q. Let's get back to the Gas Station. When you advised him of his rights, who was present?

A. I was present and the defendant was present.

Q. What happened to Thornton?

A. There were a number of people around the car. The circumstances which I performed a personal search of Mr. Schifter, I found some money in his right front pocket, I found a wallet in his rear pocket and I knew this was incriminating evidence. I said, 'Before I ask you any questions about this money, I want to make it clear that you understand your rights'.

Q. First you searched him then you advised him of his rights?

THE COURT: He found cash and what else?

THE WITNESS: Cash, \$1,000 in his front right pocket.

Q. Was Agent Thornton present when the search took place?

A. Within the immediate area. He wasn't

present right there. I was performing the search right with Mr. Schifter, right alongside of the car, he was busy doing other things.

Q. As I understand your testimony, you didn't hear Agent Thornton advise him of his rights. You came 20, 30 seconds, you don't recall whether the defendant was cuffed or not?

A. He wasn't cuffed when I performed the personal search.

Q. Then you searched him then you advised him of his rights and Agent Thornton was in the immediate area, but you don't know whether or not he heard it?

A. Right.

In respect to advising Schifter of his rights, Agent Maxwell said, at p. 67:

"A. I said you have been arrested for a federal violation. Before I ask you any questions I must advise you of your rights. You have a right to remain silent, anything you say to me can and will be used against you in a court of law; you also have a right to an attorney and to have him here present during the questioning if you wish. You also have a right to answer my questions without an attorney, and if you decide to answer the questions without an attorney you can stop the questioning at any time. Do you understand this? He replied with a nod.

Q. And that's what he did, he replied with a nod?

A. Yes."

Agent Maxwell further testified at pp. 68-69:

"A. I questioned him immediately after I advised him of his rights.

Q. In the Gas Station?

A. Yes.

Q. What questions did you ask him at that time?

A. The reason I was so implicit, I found the money which I knew was passed to him by an agent; when I found the money I was going to ask him questions regarding the money. Explaining his rights I said, 'What is this money for'? He said, 'It's for gas'.

Q. And this was in the Gas Station, not in the car?

A. Yes.

Q. What else did you question him about?

A. I said, 'Why do you have this money separated from the money in your wallet'? He said, 'I keep it separated because I have it ready for the gas'.

Q. Anything else?

A. And I believe I advised him of his rights. I said, 'Benny, you realize' --

Q. You asked him two or three questions and you advised him of his rights?

A. Yes.

Q. This was in the Gas Station?

A. Yes.

Q. He didn't understand you the first time?

A. I wanted to make it implicit to him to tell me the truth, which I knew was a lie at the time.

Q. You went through the whole thing again?

A. I said, 'You are advised of your rights. What's this money for'?

Agent Thomas Smith, who drove the Government car for Agent Maxwell, testified that his assignment was to transport the seized merchandise from the Gas Station to the Government office. After receiving the communication to make an arrest he arrived at the scene in a matter of seconds (T-35).

He could not remember if he was in the immediate area when Agent Maxwell questioned defendant Schifter but he recalls exiting the car, walking to the station wagon, looking for a weapon or things of that nature. He then stood at the rear of the station wagon awaiting instructions from Agent Thornton and Agent Maxwell. As he walked around the station wagon he heard Thornton give Schifter part of the Miranda warnings. He never heard Maxwell give any warnings. At the time Giordano was handcuffed near the station wagon (XX 38-41).*

Sergeant Richard Gregory, New York City Police Department, testified that while in the Government car with Agent Thornton, Agent Maxwell told them to move in to make the arrest. In less than a minute Agent Maxwell arrived. He and Thornton had arrested Schifter. He heard Thornton give Miranda warnings to Schifter. At this time, Giordano, equipped with a transmitter was a few feet away and should have heard this conversation,

* "XX" refers to pages of Stenographer's Minutes dated November 21, 1975, at the re-opening of Suppression Hearing.

according to Police Sergeant Gregory. He, Gregory, testified that Agent Maxwell was not present when Agent Thornton was giving the Miranda warnings. He also maintained, "at least of the KCL was on he could hear it, and it would be recorded, and the other people in the car (Kopeski and Grattan) would have heard it also". (17-28)

Agent Frank Kopeski testified that he was in the Government car with Agent Grattan. They had a KCL in the car which was monitored by Grattan. While he was able to hear the Giordano-Schifter conversation at no time did he hear Agent Thornton or Agent Maxwell or anyone else give Miranda warnings (5-15). Agent Kopeski placed the burden upon Agent Grattan. According to Kopeski it was Grattan's responsibility to monitor and record (11). Agent Grattan did not testify.

Undercover agent Joseph Giordano testified that he gave defendant Schifter \$1,000 in the office of the Gas Station. He and Schifter then went outside to Schifter's station wagon to look at the merchandise he had just purchased. He had seen only one camera lens when he and Schifter were placed under arrest. Although he was in the presence of Schifter and Agent Thornton for almost two minutes he did not hear any Miranda warnings given (80-90).

The Government's transcript of the taped conversation reflects the following:

"Who are these guys?
I don't know.
I don't know either.
Yes sir, what can we do for you?

All right fellas, Federal Agents -- put your hands over the top of the car.

Take it easy.
What's this about?
Look, I'm here to get my car serviced.
You a regular customer here?
I come here occasionally, I'm around the area, I stop here, you know.

What's your name?

Ah, Shifter.

I am with the Treasury Department, Customs at the Airport.

You got a pair of cuffs, Dick?

Yeah, Tommy's got them.

I want to talk to you a minute.

I am taking this prisoner here.

What about my cars?

Don't worry about your car. Where are the keys to it?

Its in the car, I believe.

Alright.

I think I left them in the car.

Which one is yours?

The Cadillac.

Put them out.

What's your name again?

Just sit in the back.

Wait till you hear _____

Who are these guys, I don't know who they are.

I am on tape or something.

Keys are in the car, Tom.

Ah.

Did he say where Charlie?

He's got to speak to the guy.

From all of the conflicting testimony it is obvious that the best evidence is the tape recorder and the Government's transcribed version of the tape which conclusively demonstrates that no Miranda warning(s) were, in fact, given. According to the recorded conversations neither Agents Thornton nor Maxwell gave Miranda warnings at the time they said they had. The Government's transcribed version supports this thesis.

The Court was clearly erroneous in relying upon Agent Thornton's and Agent Maxwell's conflicting testimony. (See, pp. 3-27 of the December 5, 1975 hearing.)

The conflicting testimony of the agents concerning the initial two minute period of Schifter's arrest is almost perjurious on its face. This case falls within the rationale of United States v. Marshall, 488 F.2d 1169 (9th Cir. 1974) at p. 1171 and at footnote 1.

B. The Arrest of the Defendant, Schifter, and the Search and Seizure of the Merchandise in Defendant's Station Wagon was Without Probable Cause:

As indicated above, undercover Agent Giordano and defendant Schifter's conversations were electronically recorded. Thereafter, the Government transcribed the tapes in the form of prepared transcripts. Through the interaction of the Government's transcripts of Giordano and Schifter's electronically recorded conversations and the testimony of the Agents, we endeavor to demonstrate that there was no probable cause for Schifter's arrest thus invalidating the seizure of the merchandise which forms the basis for defendant's conviction.

Undercover Agent Giordano testified that he gave defendant Schifter \$1,000 in the office of Schifter's Gas Station prior to his viewing the merchandise that he was purchasing and which was allegedly in Schifter's station wagon parked in the gas station (83-84).

Giordano and Schifter walked to the station wagon were Giordano observed one lens amongst a box full of lenses. Schifter was purportedly showing Giordano some items characterized as accessories when the Government Agents arrived and arrested Giordano and Schifter pursuant to a signal (84).

According to Giordano there was a pre-arranged signal that after the merchandise was purchased and received then Schifter was to be arrested (82-83).

Since Giordano did not arrest Schifter the issue of probable cause must come from the information that the other Government agents had to arrest and seize.

Agent Thornton was on stationary surveillance in a Government car "considering" Flatlands Avenue running East and West, (he) had been a couple of blocks South, towards the Belt Parkway. From such location he could not observe defendant Schifter's gas station (4).

When being cross-examined Agent Thornton admitted that he moved in for the arrest when the money exchanged hands. The following testimony was adduced at p. 19:

"Q. Did you know whether or not Detective Giordano had actually seen the lenses prior to the time he negotiated the sale?

A. As far as I am aware he did see the lenses.

Q. How did you know that?

A. By his comments afterwards.

Q. What were his comments, specifically?

A. Specifically, I'm not sure but I was the case agent, I had to interview him after the matter was finalized and everything was over that day, and he indicated to me that he had looked at

the merchandise before agreeing to purchase it, and he knew how many lenses he was going to buy."

Agent Thornton, by his testimony, admitted that Giordano never said at the time of arrest or even later that day that Giordano knew that the lenses he saw were stolen. As a matter of fact neither did Agent Thornton at the time of arrest (20-24).

Agent Maxwell testified that he heard over the Government's car radio the prearranged signal to make the arrest. He personally heard no conversation between Giordano and Schifter. He neither saw nor heard the transfer of the money or sale (52-54).

At the conclusion of the hearing the Court ruled "**** the tapes show, coupled together with the testimony of this last witness. (Giordano), they knew a crime had been committed". Thereafter, the Court allowed the suppression hearing to be re-opened.

Agent Gregory, who was Agent Thornton's car-partner, said Agent Maxwell advised them to make an arrest. The words used were "Move in... the money has been passed" (XX 17).

Agent Smith, who was Agent Maxwell's car-partner, received a communication to move, to make an arrest -- he did not relate this to anyone (XX 34-35).

Agent Kopeski, testified that Agent Grattan and he were listening to the conversation between Giordano and Schifter then the following was said at (XX pp. 6-7):

"Q. Now, there came a time when the agents were told to move in to make the arrest, is that correct?

A. Yes.

Q. And who gave that direction?

A. It came over the radio. I don't know who exactly the officer was. I cannot recall.

Q. Well, the one who gave the instruction, was he also the one who was listening to the KCL?

A. No, that is not the case.

Q. Somebody gave the instruction?

A. Yes, I believe so.

Q. And that party wasn't privy to the KCL, am I correct?

A. No.

Q. And do you know what motivated that party to give the instruction to move in? Was he told something by you or by Grattan, or did he make his own independent judgment at that time?

A. I do not recall.

Q. Do you recall whether either yourself or Grattan had conveyed information to the party who ordered the arrest?

A. I do recall at one instance during the conversation when the money count was going down that Agent Grattan came over the radio and notified the

rest of the parties involved, stating that the money was going down, the money count was going down."

Agent Grattan was never called as a witness. However, his partner said it was someone else other than Agent Grattan who issued the order to make the arrest.

The transcript of the tape and Giordano's testimony clearly manifests that Giordano was unaware that the lenses were in fact stolen. It is undisputed that neither Agents Smith, Maxwell, Thornton and Gregory knew with any degree of certainty that the merchandise was stolen.

Upon the authority of Whiteley v. Warden, 401 US 560 (1971) and cases and law cited therein, this Court should reverse the Court below and grant the motion to suppress.

POINT II

THE COURT INCORRECTLY INSTRUCTED THE JURY CONCERNING THE ADMISSIBILITY OF INCRIMINATING STATEMENTS.

By virtue of a pre-arranged signal three automobiles with agents converged upon the defendant at the time of his arrest. The defendant was with undercover Agent Giordano. Agents Thornton and Maxwell testified within moments they gave full "Miranda" warnings to the defendant -- and the defendant

merely nodded his head. The totality of the circumstances evinced clearly demonstrates that the purported "Miranda" warnings, if proffered, were proffered in an atmosphere of oblique if not patent coercion. Certainly the element of coercion was sufficiently pervasive as to require the Court to instruct the jury that in determining the weight to be given to the asserted inculpatory admissions of the defendant the jury could consider the fact if the inculpatory admissions were the product of coercion and duress. Thus the record reflects that the Trial Court did not, Sui Sponte, do in its instructions to the jury.

The unmistakable intent of Congress in the enactment of Title 18, U.S.C. Section 3501, was to provide adequate protection against the use of coerced confessions and a desire that the jury play a part in weighing the evidence of duress. This purpose would be subverted if, even in the absence of a proper objection, the jury were not specifically instructed as to the precise nature of its role.

In its instructions to the jury, relevant to incriminating statements attributed to the appellant, the Court stated at p. 346 of the record:

"Evidence relating to any statement, or act or omission, claimed to have been made or done by a defendant outside of Court, and after a crime has been com-

mitted, should always be considered with caution and weighed with great care; and all such evidence should be disregarded entirely, unless the evidence in the case convinces the jury beyond a reasonable doubt that the statement or act or omission was knowingly made or done

A statement or act or omission is "knowingly" made or done, if done voluntarily or intentionally and not because of mistake or accident or other innocent reason." (Underlining ours)

Then at pages 346-347, the Court more or less gives the jury an outline as indicated in Section 3501(b).

In conclusion at pages 347-348 of the record the Court states:

"If the evidence in the case does not convince beyond a reasonable doubt that a confession was made voluntarily and intentionally, you should disregard it entirely; on the other hand, if the evidence in the case does show beyond a reasonable doubt that an admission was in fact voluntarily and intentionally made by a defendant, you may consider it as evidence in the case against the defendant who voluntarily and intentionally made the admission."

The Court informed the jury at page 349 of the record, as follows:

"After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves."

Then, at page 351, the Court continued:

"As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence."

This instruction does not comport with Title 18, Section 3501. In the United States v. Barry case, Docket No. 751060, decided June 18, 1975, at p. 4125, the Court of Appeals for this Circuit reversed a conviction and ordered a new trial because, as in the instant case, the Court failed to comply with 18 U.S.C., Section 3501. In the Barry case the instruction found defective is as follows:

"Of course, it is not only your task and your duty, but it is your exclusive province to determine what the facts in the case are and, in making that determination, to consider and weigh the evidence."

The Court, in Barry, Supra, at pp. 4125-4126, in ordering a new trial said:

"For several reasons we find that this direction falls short of the statutory mandate. Most significantly, section 3501 itself states that the judge 'shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances'. (Emphasis added) It is plain from this provision that Congress contemplated a specific reference to the confession. Indeed, were we to adopt the interpretation suggested by the

Government, the entire phrase would become effectively superfluous, since it might be satisfied in any case by the standard boilerplate charge on credibility. But where, as here, such a general charge is not even supplemented by a limiting instruction at the time the evidence is introduced, the jurors are all too apt to conclude that the judge has made a binding determination that the confession was in fact and law voluntary or, perhaps, more serious, true.

The same deficiency found by the Court of Appeals in Barry, supra, is present in the instant case. The Court in relation to the defendant's admission in this case nowhere complies with Section 3501(a) which undeniably demands that the Court:

"Shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." (Emphasis supplied)

The Court's statement that a confession "should always be considered with caution and weighed with great care" does not comply with Section 3501(a).

Apart from the appellant's acts and conduct the Government relied heavily upon the defendant's admission, especially to establish jurisdiction and the Federal crime.

Thus, the failure to instruct the jury within the contemplation of Section 3501 is plain error that requires a new

trial on the authority of Barry, supra. See, also, United States v. Inman, 352 F.2d 954 (4th Cir. 1965).

The Court further failed to instruct the jury in its charge with respect to its earlier ruling at the suppression hearing following:

"THE COURT: I find that Thornton gave the defendant an adequate warning when he first apprehended him, and I find that the other warnings, while they certainly helped, that he had been given an adequate warning were unnecessary in light of the first warning.: (122)

By omission the Court permitted the jury to speculate that if Agent Thornton's alleged Miranda warnings were insufficient then perhaps Maxwell's were not. At the very least the omission improperly permitted the use of Maxwell as a bolstering factor. This is legally impermissible because at the pre-trial hearing the Court chose to limit its findings as to the Miranda warnings exclusively to Agent Thornton. "We must recognize that a Judge's silence may under some circumstances have as much impact as his words." Barry, supra, p. 4126, Cf. e.g., Jackson v. Denno, 378 U.S. 368 (1964)

The totality of the omissions illustrated that "sufficient prejudice to the defendant to justify vitiating the jury's verdict". United States v. Birnbaum, 373 F.2d 250, 257 (2d Cir. 1967).

CONCLUSION

FOR THE FOREGOING REASONS THE JUDGMENT
HEREIN APPEALED FROM SHOULD BE REVERSED.

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